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# Sivajothi a/p Suppiah v Kunathasan a/l Chelliah (No 2)

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO MTI-24–376 OF 1997
MOHD HISHAMUDIN J
B
24 AUGUST 2001

***Family Law*** *— Children — Custodianship — Application for variation of custody order — Factors to be considered — Conduct of plaintiff/wife unreasonable — Welfare and happiness of child of paramount importance — Whether defendant had proven material change in circumstances which affected the child — Law Reform (Marriage and Divorce) Act 1976 s 96*

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The defendant/husband applied to vary a custody order of the court. The court had on 15 December 1999 granted the plaintiff/wife custody, care and control of the eldest child of the couple, Venothini a/p Kunathasan ('Venothini'), and reasonable access to the husband
D (see [2000] 6 MLJ 48). The issue to be determined by the court was whether on the balance of probabilities, there had been a material change in circumstances which affected the well being of the child by virtue of s 96 of the Law Reform (Marriage and Divorce) Act 1976.

E **Held**, allowing the defendant's application:

(1) The reports of the consultant psychiatrist and the Social Welfare Department showed respectively that Venothini's separation from her father would adversely affect her mental state and personality, and had recommended that Venothini be allowed to stay with her
F father. Having personally interviewed Venothini (11 years of age), the judge found her to be an intelligent child with an independent mind, and she had unequivocally expressed strong wishes to be with her father. Also consistent with her state of mind, Venothini had, on various occasions in 2000 and in early 2001, refused to return to her mother (see p 648A–E).

G (2) Subsequent to the order of 15 December 1999, the plaintiff had been behaving unreasonably towards both the defendant and her daughter Venothini in falsely alleging an incestuous relationship between the defendant and Venothini, and that the defendant had raped his maid; the plaintiff had also made numerous attempts to
H discourage Venothini from visiting her father in Johor Bahru. The plaintiff, in her affidavits, had failed to convincingly rebut all these serious allegations. Her conduct showed scant regard to the order of the court and to the welfare of her own daughter (see pp 648F–649B).

I (3) In the light of the proven material change in circumstances, it was to her best interest that Venothini be allowed to live with her father. To deny Venothini her wish would be unreasonable and cruel. The court must give paramount consideration to the

welfare and happiness of the child (see p 649B–C); *Mahabir Prasad v Mahabir Prasad* [1981] 2 MLJ 326 followed.

[**Bahasa Malaysia summary**

Defendan/suami telah memohon untuk mengubah perintah jagaan mahkamah. Mahkamah, pada 15 Disember 1999, telah memberi jagaan, pemeliharaan dan kawalan anak sulung, Venothini a/p Kunathasan ('Venothini'), dan akses yang munasabah kepada suami tersebut (lihat ms [2000] 6 MLJ 48). Isu yang perlu diputuskan oleh mahkamah adalah sama ada pada imbangan kebarangkalian terdapat perubahan yang material di dalam keadaan yang telah mempengaruhi kebaikan kanak-kanak tersebut mengikut s 96 Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976.

**Diputuskan**, membenarkan permohonan defendan:

(1) Laporan pakar psikiatri dan Jabatan Kebajikan Masyarakat telah menunjukkan bahawa pemisahan Venothini dari ayah beliau akan mempengaruhi secara negatif keadaan mental dan personaliti beliau, dan telah mencadangkan bahawa Venothini dibenarkan tinggal dengan ayah beliau. Setelah menemuduga Venithini (11 tahun) secara peribadi, hakim telah mendapati Venothini adalah seorang kanak-kanak yang bijak dan boleh berfikir secara sendiri, dan beliau telah dengan jelasnya menyatakan bahawa beliau hendak tinggal bersama ayah beliau. Selaras dengan keadaan minda beliau, Venothini, pada keadaan-keadaan tertentu pada 2000 dan pada awal 2001, enggan pulang kepada ibu beliau (lihat ms 648A–E).

(2) Setelah perintah 15 Disember 1999, plaintif telah berkelakuan tidak munasabah terhadap defendan dan anak perempuan beliau dengan mengatakan dengan palsu bahawa terdapat perhubungan sumbang mahram di antara defendan dan Venothini; dan bahawa defendan telah merogol pembantu rumah beliau; plaintif juga telah mencuba untuk membuat Venothini tawar hati untuk melawat ayah beliau di Johor Bahru. Plaintif, di dalam afidavit beliau, telah gagal mematahkan dakwaan yang serius tersebut. Kelakuan beliau telah menunjukkan ketidakpatuhan beliau kepada perintah mahkamah tersebut dan untuk kebajikan anak perempuan beliau sendiri (lihat ms 648F–649B).

(3) Memandangkan perubahan keadaan yang mantap yang telah dibuktikan, adalah demi kebaikan Venothini supaya beliau dibenarkan tinggal bersama ayah beliau. Ia tidak munasabah dan kejam jika mahkamah tidak membenarkan Venothini tinggal bersama ayah beliau. Mahkamah mesti memberi pertimbangan yang utama kepada kebajikan dan kegembiraan kanak-kanak tersebut (lihat ms 649B–C); *Mahabir Prasad v Mahabir Prasad* [1981] 2 MLJ 326 diikut.]

**Notes**

For cases on custodianship generally, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2575–2652.

**Cases referred to**

*Mahabir Prasad v Mahabir Prasad* [1981] 2 MLJ 326 (folld)

**Legislation referred to**

Law Reform (Marriage and Divorce) Act 1976 s 96

*R Kandiah* (*Mohd Latip & Associates*) for the plaintiff.
*Balwant Singh Sidhu* (*RA Kumar* with him) (*Nijar Kumar Netto & Partners*) for the defendant.

**Mohd Hishamudin J**: The summons in chambers in encl 36 is an application by the defendant/husband to vary a custody order of the court of 15 December 1999 granting the plaintiff/wife custody, care and control of the eldest child of the couple, Venothini a/p Kunathasan, and reasonable access to the defendant/husband.

The summons in chambers in encl 75 is an application by the plaintiff/wife for an extension of time to file a further affidavit (the proposed affidavit is at encl 61) in opposition to the defendant's application vide encl 36. Enclosure 61 was affirmed on 18 May 2001.

As both applications are closely interrelated, they are heard together. I have dismissed the plaintiff's application vide encl 75. I am of the view that the application is devoid of any merit. The plaintiff failed to give a satisfactory explanation for the long delay in filing encl 61. The plaintiff also failed to explain why encl 75 (the application) was only filed on 12 July 2001, that is to say, just two days before encl 36 was scheduled to be heard (the date of hearing of encl 36 was 14 July 2001).

However, I allowed the defendant's application vide encl 36 with costs, except prayer 7 which was not addressed by both parties (the defendant is given the liberty to make a fresh application in respect of prayer 7).

The application was based on s 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), which empowers the court to vary any custody order on the ground of a material change in circumstances.

Having interviewed the child in question ('Venothini'), examined the affidavits and considering the submissions, I am satisfied that the defendant had succeeded in proving to the court, on a balance of probabilities, that there has been a material change in circumstances which affects the well being of the child.

*The state of mind of Venothini subsequent to the order*

First, after the court's order of 15 December 1999, Venothini was visibly upset and she made known her feelings to the learned judge (Faiza Tamby

Chik J), that she was not prepared to stay with her mother. The reason as to why Venothini was upset is explained by the reports (all in all, three reports) of Consultant Psychiatrist, Dr Jeyarajah Selvadurai. The reports state that Venothini is very emotionally attached to her father (the defendant) and that she is depressed upon knowing that she and her father are to be separated. The report goes on to state that to separate Venothini from her father will adversely affect her mental state and personality.

I prefer the views of Dr Jeyarajah to that of Dato' Seri Dr Mahadevan for, while Dr Jeyarajah's reports are thorough and addresses the central issue, namely, the emotional and psychological effect on Venothini if she were to be separated from her father, Dr Mahadevan's report is rather general in nature.

I have personally interviewed Venothini (11 years of age) on 14 July 2001 in my chambers, in the absence other parents and counsel. I found her an intelligent child with an independent mind, and she had unequivocally expressed to me other strong wishes to be with her father.

The welfare reports of the Social Welfare Department, Kuala Lumpur, and of the Social Welfare Department, Johor Bahru, subsequent to the custody order of the court of 15 December 1999, also confirm Venothini's state of mind. The reports state that Venothini prefers to stay with her father. And the reports, accordingly, recommend that Venothini should be allowed to stay with her father.

Consistent with her state of mind, Venothini had, on various occasions in 2000 and in early 2001, refused to return to her mother. These incidents are set out in detail in the affidavits of the defendant (see para 20 of encl 36A; para 4.2 and exh KC–5 of encl 40A; paras 37, 43, 45–47, 52 of encl 47; and paras 14 of encl 66).

*The unreasonable conduct of the plaintiff subsequent to the order*

Subsequent to the order of 15 December 1999, the plaintiff has been behaving unreasonably towards both the defendant and her daughter, Venothini. First, there is the vicious allegation by the plaintiff that the defendant had incestuous relationship with Venothini. The falsity of this allegation is confirmed by the report of Dr Abdul Kadir bin Abu Bakar, a consultant psychiatrist. The allegation is not only false, but was shamelessly and heartlessly made in front of Venothini.

Second, there is also the allegation by the plaintiff that the defendant had raped his maid. Again this allegation, made without proper investigation, turned out to be untrue. For subsequently, the maid retracted her allegation and admitted the falsity of the accusation.

I am of the view that the allegations are purposely made by the plaintiff to vent her anger at, as well as to humiliate the defendant. These allegations are prejudicial to the defendant.

Third, in spite of the fact that the order of the court granted the defendant limited access to Venothini, yet there were numerous attempts by the plaintiff (set out in detail in the defendant's affidavits, and clearly

explained in the written submission of the defendant's counsel), to prevent, or to discourage, or to place obstacles to Venothini from visiting her father in Johor Bahru. The plaintiff, in her affidavits, failed to convincingly rebut all these serious allegations.

Judging the conduct and character of the plaintiff, as described above, I have serious doubts as to her suitability to have custody of Venothini. Her conduct shows scant regard to the order of the court and to the welfare of her own daughter.

In the light of the proven material change in circumstances, as explained above, in my opinion, it is in her best interest that Venothini be allowed to live with her father. To deny Venothini her wish would be unreasonable and cruel. The court must give paramount consideration to the welfare and happiness of the child (*Mahabir Prasad v Mahabir Prasad* [1981] 2 MLJ 326).

In the light of s 96 of the Act, which clearly confers on the court the power to vary or rescind the previous order of 15 December 1999, if there has been a material change in circumstances affecting the well being of the child subsequent to the making of the order, the issues of res judicata, estoppel, and lack of jurisdiction, as raised by the plaintiff, are all irrelevant.

*Defendant's application allowed.*

Reported by Ezatul Zuria Azhari